(1) Supreme Court, U.S.

No. 001181 JAN 2 2001

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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER,

-VS-

BRUCE LEWIS HOWELL,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Fifth Amendment right against double jeopardy, including the doctrine of collateral estoppel, apply in a continuing prosecution?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS WHY THE WRIT SHOULD ISSUE 8

CONCLUSION 16

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

TABLE OF AUTHORITIES

CASES — PAGE

Ashe v. Swenson, 397 U.S. 436 (1970) 8-11
Dowling v. United States, 493 U.S. 342 (1990) 9, 10
Dunn v. United States, 284 U.S. 390 (1932) 10
Grady v. Corbin, 495 U.S. 508 (1990) 10
Harris v. Rivera, 454 U.S. 339 (1981) 11
Nesbitt v. Hopkins, 86 F.3d 118 (8th Cir. 1996) 11
Ohio v. Johnson, 467 U.S. 493 (1984) 11
Ohio v. Lovejoy, 683 N.E.2d 1112 (Ohio 1997) 11
People v. Santamaria, 884 P.2d 81 (Cal. 1994) 12
Powers v. Maryland, 401 A.2d 1031 (1979) 12
Santamaria v. Horsley, 133 F.3d 1242 (9th Cir. 1998) 13
Schiro v. Farley, 510 U.S. 222 (1994) 8
Standefer v. United States, 447 U.S. 10 (1980) 9, 15
State v. Lunzanilla (Luzanilla I), 861 P.2d 682 (App. 1993) 12
United States v. Aguilar-Aranceta, 957 F.2d 18 (1st Cir. 1992) .. 13
United States v. Bailin, 977 F.2d 270 (7th Cir. 1992) 12
United States v. DeVincent, 632 F.2d 155 (1st Cir. 1980) 14
United States v. Dixon, 509 U.S. 688 (1993) 8, 10
United States v. Dotterweich, 320 U.S. 277 (1943) 11
United States v. Farmer, 923 F.2d 1557 (11th Cir. 1991) 12
United States v. Frazier, 880 F.2d 878 (6th Cir. 1989) 12
United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979) 14
United States v. Powell, 469 U.S. 57 (1984) 11
United States v. Seley, 957 F.2d 717 (9th Cir. 1992) 13
Unites States v. Mespoulede, 597 F.2d 329 (2nd Cir. 1979) 12

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2 2

STATUTES

28 U.S.C. § 1254(1) 2

RULES

Rule 10.1, Rules of Supreme Court 2

OPINION BELOW

On March 2, 2000, the Arizona Court of Appeals decision reversed Respondent's conviction and remanded for a new trial on the grounds that collateral estoppel precluded admission of evidence that arguably supported a charge of which that Respondent was acquitted in his first trial on the same indictment. A copy of the Arizona Court of Appeals' decision is at Appendix A. The Arizona Supreme Court denied review of the state's petition for review. A copy of the order denying the petition for review is at Appendix B. A copy of the Arizona Court of Appeals' order and mandate reversing and remanding is at Appendix C.

STATEMENT OF JURISDICTION

Petitioner requests a Writ of Certiorari issue to review the decision of the Arizona Court of Appeals. (Appendix A.) The Arizona Court of Appeals issued its decision on March 2, 2000. On September 29, 2000, the Arizona Supreme Court denied the State of Arizona's petition for review. Petitioner has timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254; and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life liberty, or property, without due process of law . . .

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On April 14, 1997, the State of Arizona charged Respondent with Count I, conspiracy to commit first-degree murder, a class 1 dangerous felony or, in the alternative, conspiracy to commit dangerous or deadly assault by a prisoner, a class 2 dangerous felony; Count II, first-degree murder, a class 1 dangerous felony;[1] Count IV, dangerous or deadly assault by a prisoner, a class 2 dangerous felony; and Count V, promoting prison contraband, a class 2 felony. Trial on these counts began on June 16, 1998. On June 30, 1998, the jury found Respondent not guilty of Count I, conspiracy to commit dangerous or deadly assault by a prisoner, Count II, first-degree murder and Count IV (Count V in the indictment), promoting prison contraband. Because the jurors were unable to reach a verdict on Count III (Count IV in the indictment), dangerous or deadly assault by a prisoner, the trial court declared a mistrial on that count. A retrial on the remaining count, dangerous or deadly assault by a prisoner, began on August 12, 1998, and Respondent was convicted of that count. The trial court sentenced Respondent to a super-aggravated term of 35 years of imprisonment.

On appeal, Respondent argued, among other things, that his Fifth Amendment right against double jeopardy was violated by the admission of evidence that he contended supported the offense of promoting prison contraband—a charge of which he was acquitted in his first trial. On March 2, 2000, the Arizona Court of Appeals reversed Respondent's conviction. The court reasoned that testimony by a prison inmate that Respondent said he would "stand point" while the murder weapon (a knife) was passed through a vent to the inmate who stabbed and killed Arizona Department of Corrections Officer Brent Lumley was actually litigated in Respondent's favor in the first trial by his acquittal of the charge of promoting prison contraband. Therefore, the court of appeals concluded, the doctrine of collateral estoppel as part of the double jeopardy protection of the Fifth Amendment prevented the introduction of this evidence in

1. Count III did not involve Respondent.

Respondent's second trial on the charge of dangerous or deadly assault by a prisoner.

The State of Arizona petitioned the Arizona Supreme Court for review. The state argued that collateral estoppel did not preclude admission of the testimony in Respondent's second trial for a separate, legitimate purpose with regard to another charge, and moreover, the doctrine of collateral estoppel did not apply in a continuing prosecution. The Arizona Supreme Court denied review on September 29, 2000.

Facts of the Case

In March of 1997, inmates at the Arizona Department of Corrections (DOC), Perryville Prison, San Juan Unit[2] were able to roam freely about the building, as well as mingle in the yard with inmates from other buildings. On yard duty from 6:00 a.m. to 2:00 p.m. on Friday, March 7, 1997, were Officers Deborah Landsberger and Brent W. Lumley.

Respondent and inmate Leroy Cropper occupied adjacent cells, with a vent between them. During a search of Cropper's cell, Officers Landsberger and Lumley recovered several items of contraband. During the search, Cropper became very verbally abusive of Officer Landsberger, resulting in Cropper being placed on "lock-down" status. Cropper was also verbally abusive of other officers. Respondent heard Cropper tell the officers, "Fuck you punks. It's on." Respondent stated that Cropper was very upset and said that he was going to "get busy" and "take care of business." "Get busy" means to fight with, or assault, somebody.

Respondent reported that Cropper instructed Respondent's cellmate, Eugene Long, to get inmates "Dino" (Dino Kyser) and "Blue" (Shawn Geeslin), and that he would not "take no for an answer." Dino and Blue came to Respondent's cell, and Dino told Cropper through the vent, "If I give it to you, you better use it." Respondent stated that Dino

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2. Now named the Brent W. Lumley Unit.

was referring to "a knife, a piece." A few minutes later, Long came in the cell and showed Cropper a knife through the vent. When Cropper complained that it was "the cheap one," Long assured him that is was "the good one."

Inmates Joshua Brice and Dave Fipps entered Respondent's cell and shut the door. Brice testified that as he left, Respondent said, "I'll keep point," meaning to keep watch for guards while another inmate did something illegal. Fipps asked Respondent for masking tape, and Respondent told him where to find some in Respondent's bunk. Respondent explained to police that the inmates used fly swatter handles with masking tape to pass things through the vents. Long taped the knife to the end of two fly swatters taped together and passed it through the vent to Cropper. Dino and Blue left, saying that they would not be in the area of "anything that goes down."

Cropper called for Long to "spin [his] lock," and said that when he got out of his cell, he was going to "get busy," that is, to stab the officer or get in a fight with him. The inmates could use the keys to their cells and spin the lock until the lock aligned, and they could then open the cell door—even when they were under lockdown. Long gave Respondent Cropper's cell key and told him to spin the lock. Respondent attempted to spin the lock, but did not know how, so another inmate opened Cropper's door. Respondent admitted that, as Cropper left his cell, he warned Cropper where Officer Landsberger was, and that he also searched for Officer Lumley for Cropper and alerted Cropper when a prison counselor had left the control room. In addition, Respondent provided an empty toilet paper roll to Long in an effort to divert Officer Landsberger with a request for a new roll.

A few minutes later, Cropper entered Respondent's cell, covered in blood, exclaimed, "I got him," and yelled for his cellmate to open the door to their cell. Before returning to his own cell, Cropper removed his bloody clothing and threw it into Respondent's trash can. Respondent took the trash bag of bloody clothes and threw it on the roof. Respondent also cleaned blood off of Cropper's cell doorknob with a sock.

Officers Coglanese and Bartlow, reporting for the afternoon shift, discovered Officer Lumley sitting in a pool of blood with a knife protruding from his neck. Officer Lumley still had a pulse, but died shortly thereafter despite efforts to revive him. Officer Lumley sustained numerous incised and "stacking wounds," mostly to the neck and anterior upper chest area, which resulted in internal hemorrhaging leading to death. The primary wound was caused by the knife entering the front of Officer Lumley's neck, striking the clavicle, and entering the right side of his chest, causing the loss of nearly 2 liters of blood. This wound cut major blood vessels and was fatal; Officer Lumley died within minutes.

REASONS WHY THE WRIT SHOULD ISSUE

This Court should grant the petition for writ of certiorari because the Arizona Court of Appeals has decided an important federal constitutional question in a way that conflicts with decisions of this Court and some federal circuit courts of appeal that recognize that the doctrine of collateral estoppel does not apply in a continuing prosecution.

A. The Arizona court has misapplied the doctrine of collateral estoppel as established by this Court and followed by some federal circuit courts of appeal and ultimate state courts of appeal.

A defendant is entitled under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution to be free from multiple prosecutions and punishments for the same criminal offense. *Schiro v. Farley*, 510 U.S. 222, 229 (1994); *United States v. Dixon*, 509 U.S. 688, 695–96 (1993). Incorporated in this right is the doctrine of collateral estoppel, which "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Schiro*, 510 U.S. at 232, *quoting Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

Ashe is this Court's seminal opinion recognizing collateral estoppel as part of the Fifth Amendment guarantee against double jeopardy. In *Ashe*, six men were robbed while playing poker in the basement of a home. 397 U.S. at 437. Several masked, armed men broke into the basement and robbed each of the poker players. *Id.* Ashe was charged with seven separate offenses—armed robbery of each of the six poker players and theft of one of the victim's car. *Id.* at 438. Ashe was brought to trial on the charge of robbing one of the poker players (Donald Knight). *Id.* At trial, there was no dispute that an armed robbery had occurred and that personal property had been taken from Knight. *Id.* The only issue was whether Ashe was one of the robbers. *Id.* at 438–39. The jury found Ashe "not guilty due to

insufficient evidence." *Id.* at 439. Six weeks later, the state brought Ashe to trial again, this time for the robbery of another poker player. *Id.* This time, a jury found Ashe guilty. *Id.* at 440.

Finding, upon review of the record of the first trial, that the only rationally conceivable issue in dispute before the jury was whether Ashe had been one of the robbers, this Court concluded that a *second* separate prosecution for robbery of a different victim was impermissible. *Ashe*, 397 U.S. at 444–45. This Court explained that

> [t]he question is not whether Missouri could validly charge [Ashe] with six separate offenses for the robbery of six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that [Ashe] was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again.

Id. at 446. *Ashe*, therefore, addresses the propriety of a *second prosecution* involving a fact previously litigated and decided in the defendant's favor in the first prosecution.

In *Ashe*, the state could have brought Ashe to trial for six counts of robbery in the first prosecution, which this Court acknowledged is entirely permissible. 397 U.S. at 446. Suppose the jurors had then *acquitted* Ashe of robbery of three of the victims and *convicted* him of robbery of three of the victims—even though the only "rationally conceivable issue in dispute" was whether Ashe was one of the robbers. This irrational result would have been perfectly constitutional because inconsistent verdicts are permissible. *See Dowling v. United States*, 493 U.S. 342, 353–54 (1990) (inconsistent verdicts are constitutionally tolerable); *Standefer v. United States*, 447 U.S. 10, 25 (1980). Likewise, if in the same trial on six charges in one prosecution, the jurors had *acquitted* Ashe of robbery of three of the victims and *hung* on robbery charges regarding the other three victims. Nothing in the *Ashe* opinion indicates the state would be prevented from retrying the

defendant on the three hung charges of robbery, using the same evidence, as part of a *continuing prosecution*. What *Ashe* holds—indeed, all it holds—is that the state is prevented from bringing a second, subsequent prosecution based on the same evidence previously litigated in the defendant's favor in the first prosecution. *See Dowling*, 493 U.S. at 348 ("[W]e decline to extend Ashe v. Swenson and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted."). *See also Dixon*, 509 U.S. at 696 (The protection against double jeopardy "applies both to successive punishments and to *successive* prosecutions for the same criminal offense.") (Emphasis added.)[3]

The doctrine of collateral estoppel is based on an assumption that the jury at the first trial acted rationally in acquitting the defendant. However, if, at a single trial, as in the instant case, a jury acquits on some counts, and there is no logically consistent way for it to have failed to acquit on others, the assumption of rational, consistent verdicts, upon which collateral estoppel is based, does not exist. In *Dunn v. United States*, 284 U.S. 390 (1932), this Court held that a criminal defendant convicted by a jury on one count could not attack that conviction because it was inconsistent with the jury's verdict on another count. 284 U.S. at 393. The Court explained, "[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does

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3. In *Dixon*, this Court overruled the "same conduct" test of *Grady v. Corbin*, 495 U.S. 508 (1990), for double jeopardy purposes, and, though collateral estoppel was not at issue, the majority noted, "[t]he collateral-estoppel effect attributed to the Double Jeopardy Clause, see Ashe v. Swenson, may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts. But this does not establish that the Government 'must . . . bring its prosecutions . . . together.' It is entirely free to bring them separately, and can win convictions in both. Of course, the collateral-estoppel issue is not raised in this case." 509 U.S. at 705 (citation omitted.).

not show that they were not convinced of the defendant's guilt." *Id.* at 393, citation omitted.

This Court has reaffirmed the *Dunn* rule on several occasions. *See, e.g., Harris v. Rivera*, 454 U.S. 339, 345–46 (1981); *United States v. Dotterweich*, 320 U.S. 277, 279 (1943). In *United States v. Powell*, 469 U.S. 57 (1984), this Court quoted *Dunn* approvingly and rejected a proposed exception to its holding. 469 U.S. at 64–67. In reaching the conclusion that the *Dunn* rule stands without exception, this Court explained:

> The problem is that the same jury reached inconsistent results; *once that is established principles of collateral estoppel*—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—*are no longer useful*.

469 U.S. at 68, emphasis added. As shown by the "*Ashe* hypotheticals" illustrated above, the principle of collateral estoppel *does not apply* to the continuing, multiple-trial prosecution of a multicount indictment. *See also Ohio v. Johnson*, 467 U.S. 493, 500 n.9 (1984) ("[W]here the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable").

B. While the precedent from this Court supports the State of Arizona's belief that collateral estoppel does not apply to continuing prosecutions, the circuit courts are split on how to interpret the collateral estoppel doctrine.

The federal circuit courts of appeal do not agree on how collateral estoppel should be applied. The Eighth Circuit has specifically held that the *Ashe* rule of collateral estoppel does not apply when verdicts of guilt and innocence are rendered in a single trial. *Nesbitt v. Hopkins*, 86 F.3d 118, 121 (8th Cir. 1996). Some states have adopted this approach as well. *See Ohio v. Lovejoy*, 683 N.E.2d 1112, 1114–19

(Ohio 1997) (when a jury finds a defendant not guilty as to some counts and hangs on other counts, double jeopardy and collateral estoppel do not apply where the inconsistency in the responses arises out of inconsistent responses to different counts, not out of inconsistent responses to the same count); *People v. Santamaria*, 884 P.2d 81, 84–86 (Cal. 1994) (acknowledges that successive prosecutions are primary evil to be guarded against when applying collateral estoppel in criminal matter—but ultimately avoids deciding whether collateral estoppel is limited to successive prosecutions).

However, other circuits have held that collateral estoppel applies in a continuing prosecution. *See United States v. Bailin*, 977 F.2d 270, 276–77 (7th Cir. 1992) ([collateral] estoppel applies in criminal case and, in retrial of mistried count in a multicount indictment, [collateral] estoppel bars the government from relitigating issues that were necessarily and finally decided in the defendant's favor by reason of the jury's partial acquittal on other counts); *United States v. Frazier*, 880 F.2d 878, 883 (6th Cir. 1989) (when a jury acquits on some counts in a multicount indictment, principles of collateral estoppel may preclude retrial of charges upon which jury was unable to agree at earlier trial); *Unites States v. Mespoulede*, 597 F.2d 329, 330–37 (2nd Cir. 1979) (principles of collateral estoppel as contained in Double Jeopardy Cause are applicable to retrial of charges contained in multicount indictment). Some states, including Arizona, follow this application of collateral estoppel. *See State v. Lunzanilla (Luzanilla I)*, 861 P.2d 682, 686 (App. 1993) (*vacated in part on other grounds, but disposition of collateral estoppel issue expressly approved by State v. Luzanilla (Luzanilla II)*, 880 P.2d 611, 613 (1994)) (principle of collateral estoppel, an essential part of the Double Jeopardy Clause in criminal prosecutions, is applicable to the retrial of changes contained in a multicount indictment); *Powers v. Maryland*, 401 A.2d 1031, 1042 (1979) (doctrine of collateral estoppel applies after jury, at single trial, acquits on one count of multicount indictment and is unable to agree upon verdict on related count of same indictment involving common issue of open fact, which if found in favor of accused would establish his innocence on both counts).

Some circuits proceed to analyze whether an issue of ultimate fact was actually litigated in the previous proceeding without first determining whether collateral estoppel actually applies in a continuing prosecution. For example, in *United States v. Farmer*, 923 F.2d 1557 (11th Cir. 1991), the defendant was charged in one indictment with one count of conspiracy to willfully deprive the victim of his civil rights (the "conspiracy count") and one count of aiding and abetting the willful deprivation of the victim's civil rights under color of state law (the "substantive count"). 923 F.2d at 1560–61. At the conclusion of a trial, the jury acquitted the defendant on the conspiracy count, and was unable to reach a verdict on the substantive count, resulting in a mistrial on that count. *Id.* at 1561. The defendant argued on appeal that double jeopardy and the included doctrine of collateral estoppel barred the retrial on the substantive count after his prior acquittal on the conspiracy count. *Id.* at 1562. Pointing out that "the reprosecution on the substantive count . . . is not a successive prosecution barred by double jeopardy but rather, a mere continuation of the initial prosecution," the Eleventh Circuit rejected the defendant's double jeopardy claim. *Id.* at 1563. Turning to the collateral estoppel argument, the court went directly to a merits analysis regarding whether the issue in question was actually raised and litigated in the prior proceeding, stating, "[W]e do not reach the issue of whether the doctrine of collateral estoppel is limited, like its parent doctrine of double jeopardy, only to successive prosecutions." *Id.* at 1563, footnote 12. *See also*, *Santamaria v. Horsley*, 133 F.3d 1242, 1244 (9th Cir. 1998) ("Nor are we concerned with whether collateral estoppel should be limited to subsequent trials, as opposed to retrials; we assume without deciding that the doctrine does apply to retrials.").

Other circuits likewise avoid the initial question of applicability of collateral estoppel in a continuing prosecution and proceed to analysis on the merits, thus applying collateral estoppel on the basis of what the record reveals was actually litigated in the previous proceeding. *See e.g., United States v. Aguilar-Aranceta*, 957 F.2d 18, 22–24 (1st Cir. 1992) (in two-count indictment, acquittal on charge of importation of cocaine did not represent jury determination that defendant did not know contents of packages and, therefore, did not collaterally estop

relitigation of knowledge issue in prosecution for possession of that cocaine with intent to distribute); *United States v. Seley*, 957 F.2d 717, 720–23 (9th Cir. 1992) (a jury acquitted defendant of first two counts of indictment, but hung on conspiracy count—on retrial of conspiracy charge, evidence relating to the possession and importation charges would be barred by collateral estoppel, and that without such evidence, the conspiracy charge must be dismissed); *United States v. DeVincent*, 632 F.2d 155, 160–61 (1st Cir. 1980) (in trial of several counts ending in acquittal of some and mistrial of one, intricate nature of counts and course of jury's deliberations did not show realistically and rationally that the acquittal of one count involved any determination of the elements of the mistried counts, thus not estopping a retrial of mistried count); *United States v. Larkin*, 605 F.2d 1360, 1369–71 (5th Cir. 1979) (defendant tried under one indictment of one conspiracy count and several substantive counts under a vicarious liability theory and was acquitted of the substantive counts, though the jury hung on the conspiracy count leading to a mistrial declared as to that count; government attempted to retry on that count, and court, without specifically addressing applicability of collateral estoppel to a continuing prosecution, went to analysis on the merits of what issues were actually litigated in first trial).

The doctrine of collateral estoppel, founded in the Double Jeopardy Clause, is being inconsistently applied in continuing prosecutions amongst the circuit courts, and even within the circuits themselves, as well as amongst the states. This Court should resolve the issue to prevent an injustice in this case and numerous future cases. This Court has noted the quandry resulting when the doctrine of collateral is improperly applied in *continuing* prosecutions:

> First, in a criminal case, the Government is often without the kind of "full and fair opportunity to litigate" that is a prerequisite of estoppel. Several aspects of our criminal law make this so: the prosecution's discovery rights in criminal cases are limited, both by rules of court and constitutional privileges; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the

verdict no matter how clear the evidence in support of guilt; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence; and it cannot secure appellate review where a defendant has been acquitted.

The absence of these remedial procedures in criminal cases permits juries to acquit out of compassion or compromise or because of "their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." It is of course true that verdicts induced by passion and prejudice are not unknown in civil suits. But in civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the Government has no similar avenue to correct errors. *Under contemporary principles of collateral estoppel, this factor strongly militates against giving an acquittal preclusive effect.*

Standefer, 447 U.S. at 22 (citations omitted, emphasis added).

CONCLUSION

Based on the foregoing authorities and arguments, Petitioner respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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104824

APPENDIX A

IN THE COURT OF APPEAL
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA	)	1 CA-CR 98-0886
	)	
Appellee,	)	DEPARTMENT A
	)	
vs.	)	MEMORANDUM ION
	)	DECISION
	)	(Not for publication - Rule 111,
BRUCE LEWIS HOWELL,	)	Rules of the Arizona Supreme
	)	Court)
Appellant.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR 97-03949

The Honorable Gregory Martin, Judge

REVERSED AND REMANDED

Janet A. Napolitano, The Attorney General
By: Paul J. McMurdie, Chief Counsel
Criminal Appeals Section
and
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BACKGROUND

Defendant Bruce Howell, an inmate at Perryville Prison, allegedly aided fellow inmate Leroy Cropper in assaulting and killing corrections officer Brent Lumley. Defendant was charged with first degree murder, dangerous or deadly assault by a prisoner, conspiracy to commit first degree murder/dangerous or deadly assault by a prisoner, and promoting prison contraband. In defendant's first trial, the jury could not reach a verdict on the charge of dangerous or deadly assault, and acquitted him of the remaining charges. Defendant was retried for dangerous or deadly assault by a prisoner and was convicted. He timely appealed.

Defendant argues on appeal that the jury panel was tainted, that the court erred in admitting evidence that should have been precluded by collateral estoppel, that the court erred in admitting a photograph of the deceased victim, that the prosecutor engaged in misconduct, and that the court sentenced him under the wrong statute. We conclude that defendant's conviction must be reversed based on the collateral estoppel claim. We address the issue of the photograph because it is likely to arise again in a retrial, but it is not necessary to address defendant's remaining claims.

Defendant and Cropper occupied adjacent cells, between which was a vent. The State presented evidence, mostly through defendant's own

statements to investigators, that on the day of the assault, defendant overheard Cropper make abusive statements to Officers Brent Lumley and Deborah Landsberger after a search of his cell resulted in confiscation of contraband. Cropper was placed in lockdown status, meaning he was locked in his cell.[1] Cropper then told defendant's cellmate, Eugene Long, to get Dino (Dino Kyser) and Blue (Shawn Geeslin), the inmates who ran the yard, and that he would not "take no for answer." Dino and Blue came to defendant's cell, and Dino told Cropper through the vent that "if you get it . . . then you're going to have to use it." A short time later, Long returned and showed Cropper a knife through the vent. Cropper complained that it was not the good knife, but Long told him it was.

Two other inmates, Dave Fipps and Joshua Brice, came into the cell as defendant left. Brice testified, as he had in the first trial, that as he and defendant crossed paths, defendant said he would "stand point," meaning to keep watch. While defendant was outside, Fipps opened the door and asked defendant where his masking tape was, and defendant told him. Defendant explained to investigators that Long had previously used fly swatters taped

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[1] Except during the formal count, inmates not in lockdown status generally had free movement within their buildings during the day.

together to pass food through vent. Brice and Fipps both testified that the knife was passed in that manner from defendant's cell to Cropper in the next cell.

Defendant stated that Long gave him the key to Cropper's cell and told him to "spin the lock" to open the cell door.[2] Defendant attempted to do so but did not know how, so another inmate opened Cropper's door. Defendant also admitted that as Cropper was preparing to leave his cell, defendant told him where the female officer was, searched for Officer Lumley at Cropper's request, and told Cropper when a counselor, who was talking to an officer at the door of the control room, had left.

A few minutes later, Cropper entered defendant's cell and yelled to his, Cropper's, cellmate to open the door to their cell. Cropper, who was covered in blood, removed his bloody shirts and threw them into defendant's trash can. He then left and returned to his own cell. Defendant then took the trash bag of clothes and threw it on the roof. When another inmate told defendant that there was blood on Cropper's door, defendant grabbed a sock and wiped the doorknob.

Defendant contended that before Cropper's assault on Lumley, nothing indicated to him that anything out of the ordinary was going to happen. He

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2. Spinning the lock is a method by which an inmate could have another inmate open the cell door from the outside despite being under lockdown status.

testified that it was not unusual to hear an inmate use profanity to a guard or to be frustrated or angry because his cell was searched. Although he assisted Cropper in leaving his cell, defendant did not know that Cropper was planning to commit an assault. Defendant denied saying that he would keep watch when the knife was passed and denied knowing that the knife was being passed when that was happening. Defendant disposed of the clothes for his own protection and only pretended to wipe blood off Cropper's door because if he did not and blood was found on the door, he could be in trouble with other inmates.

ANALYSIS

Collateral Estoppel

In defendant's first trial, he was charged with promoting prison contraband. The charge specified that defendant "knowingly obtained, possessed or conveyed contraband, to-wit; a stainless steel carving knife" while a prisoner. In the first trial, Joshua Brice testified that as he entered the cell he passed defendant, who told Brice that he, defendant, would "stand point." The State argued that this statement showed defendant knew the knife was being passed through the vent and that defendant knowingly aided that effort by keeping watch. However, defendant was acquitted of the charge of promoting prison contraband.

Before defendant's subsequent trial for aiding a dangerous assault, defendant moved to preclude Brice's "stand point" testimony on double jeopardy and collateral estoppel grounds. Alternatively, defendant asked the court to give an interrogatory to the jury inquiring whether the jury found that defendant had assisted in Cropper's obtaining the knife, arguing that if the jury convicted based on a conclusion that defendant had supplied such assistance, the verdict would not be legitimate. The court denied the motion, and Brice testified as he had at the first trial. Defendant assigns this as error.

The doctrine of collateral estoppel is part of the Fifth Amendment guarantee against double jeopardy. See *Ashe v. Swenson*, 397 U.S. 436, 442 (1970). It bars the State from relitigating an ultimate fact determined in the defendant's favor at a previous trial. *State v. Luzanilla*, 176 Ariz. 176 Ariz. 397, 401, 861 P.2d 682, 686 (App. 1993), *vacated in part on other grounds*, 179 Ariz. 391, 880 P.2d 611 (1994). The defendant bears the burden of demonstrating that the issue he seeks to preclude was necessarily decided in his favor in the prior proceeding. *See Dowling v. U.S.*, 493 U.S. 342, 350 (1990); *State v. Detrich*, 188 Ariz. 57, 62, 932 P.2d 1328, 1333 (1997). In considering whether collateral estoppel applies, we review the record from the first trial to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444 (quoting Daniel K.

Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38–39 (1960)). The preclusive effect of the prior verdict is a question of law we review *de novo*. *See Schiro v. Farley*, 510 U.S. 222, 232 (1994).

The jury in the first trial was instructed that the crime of promoting prison contraband requires proof that a person knowingly obtained, possessed or conveyed contraband during the person's confinement in a correctional facility. The jury was also instructed that a person could be criminally accountable as an accomplice if the person, "with intent to promote or facilitate the commission of an offense, aids, counsels, agrees to aid, or attempts to aid another person in planning or committing the offense or provides the means or opportunity to another person to commit the offense." The State's theory was that by keeping watch, defendant had assisted other inmates in passing the knife to Cropper.

In determining whether the jury could have acquitted on any basis other than finding that defendant did not keep watch, we must presume the jury acted rationally. *See Ashe*, 397 U.S. at 444; *Detrich*, 188 Ariz. at 62, 932 P.2d at 1333. A rational jury could not have acquitted defendant based on a finding that those involved were not prisoners or that the knife was not contraband. Similarly, a rational jury could not have concluded that the knife was not conveyed, as evidence was offered by both the State and defendant

that the knife was passed from defendant's cell to Cropper's cell through the vent while defendant stood outside. Therefore, the jury must have concluded that the State failed to prove beyond a reasonable doubt that defendant knowingly assisted with the knife. This necessarily includes a finding that defendant did not state to Brice that he would "stand point."

The State relies on *State v. Detrich*, but we find that case distinguishable. In *Detrich*, the court found that the evidence describing sexual assault was admissible at the second trial notwithstanding acquittal of sexual assault at the first trial. 188 Ariz. at 63, 932 P.2d at 1334. The evidence was admissible because it was not being offered to show that defendant had actually engaged in sexual intercourse with the victim but to show defendant's underlying intent to do so, a necessary element of the charge of kidnapping. *Id.* In other words, that the nonoccurrence of the act of sexual assault had been decided in defendant's favor did not preclude a witness from testifying to circumstances which indicated that defendant *intended* a sexual assault.

In this case, by contrast, the evidence was offered for the same purpose at each trial, namely to show that the defendant to show that the defendant assisted with the conveyance of the knife to Cropper. Here, one of the prosecutors told the court that "[w]e're going to argue that what he did was knowingly assist these men in a series of events that led to an assault." To

show the assistance, the State presented evidence, *inter alia*, that by keeping watch defendant was aiding in passing the knife. This fact, however, was precisely the one decided in defendant's favor in the prior proceeding. *See State v. Jimenez*, 139 Ariz. 138, 140, 634 P.2d 950, 952 (1981) (collateral estoppel applies when the issue is precisely the same in both trials). Thus, the evidence from Brice that defendant said he would "stand point" should have been precluded under the doctrine of collateral estoppel.

We find that the admission of the evidence was prejudicial and cannot be classified as harmless error. While there was other evidence of defendant's involvement, all of it was subject to differing explanations, defendant's pointing to his innocence and the state's to his guilt. The "stand point" testimony, however, was susceptible only to the conclusion that defendant knowingly assisted obtaining and conveying the knife and the state used it to argue as much to the jury. We cannot say beyond a reasonable doubt that the jury would still have convicted defendant if it had not heard the "stand point" testimony. *See State v. Fordor*, 179 Ariz. 442, 450, 880 P.2d 662, 670 (App. 1994) (error is harmless only when we can say beyond a reasonable doubt that the erroneously admitted evidence had no influence on the jury's verdict). Consequently, we must vacate defendant's conviction and remand for a new trial.

The Photograph

Defendant argues that the court erred in admitting a photograph of the victim with a knife protruding from his neck. Admissibility of a photograph is determined by its relevance, by the tendency of the photograph to inflame the passions of the jury, and by whether the probative value outweighs its potential to cause unfair prejudice. *See State v. Spreitz*, 190 Ariz. 129, 141, 945 P.2d 1260, 1272 (1997). We will not disturb a trial court's decision to admit photographic evidence absent a clear abuse of discretion. *See State v. Amaya-Ruiz*, 166 Ariz. 152, 170, 800 P.2d 1260, 1278 (1990).

The photograph in question shows the victim, without a shirt, laying down on his back. The handle end of a large knife protrudes from the left side of the front of his neck and lays on his chest. The photo shows mostly the victim's chest, the underside of his chin, and the lower portion of the left side of his face. what appear to be two small wounds are visible near the insertion point of the knife. Visible blood although present, is minimal. The photograph is approximately 3 inches by 5 inches with triangular cutouts where the subject's shoulders and arms would be.

The photograph clearly illustrates an assault with a deadly weapon. It also corroborates the testimony of the officers who discovered the victim as well as that of the medical examiner that the assault involved multiple stab wounds. the fact that Defendant did not contest that the victim was assaulted

with a knife does not itself make the photograph irrelevant. *See State v. Rienhardt*, 190 Ariz. 579, 584, 951 P.2d 454, 459 (1997).

Furthermore, the photograph is not particularly gruesome. Although unpleasant, the photograph was not likely to have inflamed the passions of the jury or to have caused unfair prejudice against defendant. Admission of the photograph was within the trial court's discretion, and we find no abuse.

CONCLUSION

The admission of the testimony of Joshua Brice that defendant stated he would "stand point" was reversible error. We therefore vacate defendant's conviction and remand for a new trial.

/s/_____

James B. Sult, Judge

CONCURRING:

/s/_____

Rebecca White Berch, Presiding Judge

/s/_____

James M. Ackmerman, Judge

APPENDIX B

SUPREME COURT OF ARIZONA

NOEL K. DESSAINT
CLERK OF THE COURT

STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
PHOENIX, ARIZONA 85007-3231

KATHLEEN K. KEMPLEY
CHIEF DEPUTY
CLERK

TELEPHONE (602(542-9396

RE: **STATE OF ARIZONA vs. BRUCE LEWIS HOWELL**
Arizona Supreme Court No. CR–00–0236–PR
Court of Appeals Division One No. 1 CA-CR 98–0886
Maricopa County Superior Court No. CR 97–03949

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 26, 2000, in regard to the above-referenced cause:

ORDERED: The State of Arizona's Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 29th day of September, 2000.

Noel K. Dessaint, Clerk

TO:
Hon. Janet A. Napolitano, Esq., Arizona Attorney General
Attn: Paul J. McMurdie, Esq., and Ginger Jarvis, Esq.
Richard M. Romley, Esq., Maricopa County Attorney
Attn: Robert J. Shutts, Esq.
Richard L. Parrish, Esq., Kimerer & LaVelle PLC, Tucson office
West Publishng Company, Editorial Department D4-40
Lexis-Nexis
Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix

APPENDIX C

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, vs. BRUCE L. HOWELL Appellant.	)	1 CA CR 98-0886 DEPARTMENT A MARICOPA County Superior Court No. CR 97-03949

ORDER and MANDATE

Janet A. Napolitano, The Attorney General
By: Paul J. McMurdie, Chief Counsel
Criminal Appeals Section
and
Ginger Jarvis, Assistant Attorney General
Attorneys for Appellee — Phoenix

Richard Parrish
Attorney for Appellant — Phoenix

The memorandum decision of this Court in the above matter was filed on March 2, 2000.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated September 26, 2000, the Arizona

Supreme Court denied the petition for review, Supreme Court No. CR 00-0236-PR.

IT IS ORDERED in conformity with the memorandum decision attached hereto.

IT IS FURTHER ORDERED that a certified copy of the foregoing ORDER and MANDATE and a copy of the memorandum decision of the Court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona, on October 23, 2000. A copy of the ORDER and MANDATE and a copy of the memorandum decision were mailed to the Honorable Gregory H. Martin, Judge, and a copy of the ORDER and MANDATE was mailed on said day to each party appearing or the attorneys of record; as well as the MARICOPA County Attorney.

IT IS FURTHER ORDERED pursuant to this Court's order of the 11th day of March, 1965, that the Clerk of this Court return to the Clerk of Superior Court, all records, exhibits, and other matters received from said Clerk of this Court in aid of the consideration of this matter.

DATED October 23, 2000.

/s/Edward C. Voss
Vice Chief Judge

All of the foregoing directives were
completed with October 23, 2000.

GLEN D. CLARK, Clerk
By

/s/_____
Deputy Clerk

(2)

No. 00-1181

Supreme Court, U.S.
FILED
FEB 7 2001
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER,

-vs-

BRUCE LEWIS HOWELL,
RESPONDENTS.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

JANET NAPOLITANO
ATTORNEY GENERAL

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ATTORNEYS FOR RESPONDENTS

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SUPPLEMENTAL STATEMENT OF THE CASE

On December 28, 2000, Petitioner filed a Petition for Writ of Certiorari in this matter. Pursuant to Rule 15.8 of the United States Supreme Court Rules, Petitioner now submits this Supplement to the Petition for Writ of Certiorari.

REASONS WHY THE PETITION WAS TIMELY

On January 23, 2001, this Court noticed by letter that Petitioner's Petition for Writ of Certiorari was considered untimely based on the date listed within the body of the Arizona Supreme Court's denial of the State of Arizona's petition for review, which refers to the date the court met in conference on the matter—September 26, 2000. However, the order denying the petition for review did not issue until September 29, 2000. Unfortunately, that date, which appears at the top of the order, was inadvertently deleted from the Arizona Supreme Court order when it was retyped as Appendix B. The date the order issued, September 29, 2000, is the date from which the 90-day time period in which a Petition for Writ of Certiorari may be filed is calculated because that is the date of the order denying discretionary review. *See* United States Supreme Court Rule 13.1. Therefore, Petitioner's Petition for Writ of Certiorari, which was postmarked December 28, 2000, is timely. A corrected copy of the Arizona Supreme Court's order is attached as Appendix A. A copy of the original was faxed directly to this Court on February 1, 2001.

Alternatively, 28 U.S.C. 2101(d) provides that the time for applying for a writ of certiorari to review a judgment of a state court in a criminal case is prescribed by rules of the Supreme Court. Unlike civil cases, which this Court has held that compliance with the 90-day period is both "mandatory and jurisdictional" and not capable of being extended by the court "except as Congress permits" (*see Missouri v. Jenkins*, 495 U.S. 33, 45 (1990)), in criminal cases, the time for filing a petition for certiorari has long been prescribed by Supreme Court rules. *See Schacht v. United States*, 398 U.S. 58, 63–64 (1970). Therefore, if this Court disagrees with Petitioner's

calculation of time from the date of the order, the time is not a jurisdictional defect in this criminal case, and Petitioner respectfully requests that this Court consider the merits of the petition.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court consider the petition for writ of certiorari as timely filed and address it on the merits.

Respectfully submitted,

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Attorney General

RANDALL M. HOWE
Chief Counsel
Criminal Appeals Section

GINGER JARVIS
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(Counsel of Record)

Attorneys for RESPONDENTS

CRMCRM98-1607
105571

APPENDIX A

SUPREME COURT OF ARIZONA

STATE OF ARIZONA
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September 29, 2000

RE: **STATE OF ARIZONA vs. BRUCE LEWIS HOWELL**
Arizona Supreme Court No. CR-00-0236-PR
Court of Appeals Division One NO. 1 CA-CR 98-0886
Maricopa County Superior Court No. CR 97-03949

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 26, 2000, in regard to the above-referenced cause.

ORDERED: The State of Arizona's Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 29th day of September, 2000.

Record returned the Court of Appeals, Division One, Phoenix, this 29th day of September, 2000.

Noel K. Dessaint, Clerk

TO:
Hon. Janet A. Napolitano, Esq., Arizona Attorney General
Attn: Paul J. McMurdie, Esq., and Ginger Jarvis, Esq.
Richard M. Romley, Esq., Maricopa County Attorney
Attn: Robert J. Shutts, Esq.
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West Publishng Company, Editorial Department D4-40
Lexis-Nexis
Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix

Supreme Court, U.S.
FILED
MAR 22 2001
OFFICE OF THE CLERK

No. 00-1181

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

BRUCE L. HOWELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF ARIZONA, DIVISION ONE

BRIEF IN OPPOSITION

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THE FACTS OF THE CASE

The facts essential for a determination of the legal issue presented to this Court are somewhat different than those recited by the State in its Petition, because the State sets forth as *facts* certain unwarranted *conclusions* that it reaches from the facts. The unadorned facts, from the actual testimony in the case, are as follows.

Bruce Howell's cell adjoined the murderer's (Leroy Cropper's) cell by a party wall. High in the party wall was a three foot long ventilation duct, with metal cross slatted covers on each end. Prisoners could communicate with each other through this duct by standing on the toilets in the respective cells. On the morning of March 7, 1997, Howell heard parts of conversations that occurred between his cellmate, Eugene Long, standing on the toilet in their cell, and Cropper in the adjoining cell. Some of the conversation involved amorphous threats by Cropper against unnamed guards and inmates alike, and another vague threat that Cropper was going to "get it on." But Long and Cropper were laughing, and Howell didn't take any of it seriously. Such tough talk was common among inmates, and no guard had been murdered in any Arizona Prison for 32 years. To do so, Howell testified, would be tantamount to committing suicide. This was a medium security prison with inmates determined by the Department of Corrections to be non-dangerous, and Howell had no inkling that Cropper would actually kill a guard.

Possession of knives among prisoners was commonplace. In the inmate culture, many of them felt a need to "hold steel."[1] After lunch, Howell's cellmate, Long, came into the cell and "whipped" a knife blade out of his belt, stood on the toilet, and

1. Testimony from a prison investigator was that such knife blades come into the prison in the boot soles of inmates who work outside the prison on highway maintenance. They slit the thick soles of their work boots and slide in knife blades they find along the roadway.

displayed it through the ventilation duct to Cropper. Howell told Long that he didn't want the knife in the cell, and Long ignored him. At this point, inmate Joshua Brice came into the cell. Brice had earlier given the knife to Long. Howell opened the door to leave the cell, and as he left, a third inmate, David Phipps, came into the cell and closed the solid metal door behind him. Howell sat down on a chair outside his cell on the second floor "run". Howell testified that he did not see or realize at the time that Long, Brice, and Phipps had taped two flyswatters together, taped the knife to one end, and passed the knife to Cropper through the ventilation duct. No evidence contradicted the fact that Howell was sitting outside the closed cell during this transaction.

However Brice, who agreed to testify against Howell in exchange for not having to serve any additional time in prison, testified that when Howell left the cell, Howell said, "I'll stand point." The meaning of which, in prison parlance, was that Howell would be the lookout for any approaching guards. Howell denied saying this. "I'll stand point" was the sole evidence that the State presented in the first trial in an effort to convict Howell of the crime of "promoting prison contraband," *i.e.*, aiding and abetting supplying the knife (murder weapon) to Cropper (the murderer). Howell was acquitted of promoting prison contraband, as he was of first degree murder and conspiracy to commit dangerous assault by a prisoner. The jury hung on "aiding and abetting dangerous assault by a prisoner," and the trial court declared a mistrial.

Two months later, a second trial was held on the mistried charge, dangerous assault by a prisoner. Over the repeated objections of Howell's attorney, the trial court once again permitted the State to introduce precisely the same testimony by Brice, that Howell had left the cell and said, "I'll stand point."

REASONS FOR DENYING THE WRIT

The Court of Appeals of the State of Arizona held that the introduction of this *fact* in the second trial, which had conclusively been determined against the State in the first trial, violated the 5th Amendment's prohibition against double jeopardy by collateral estoppel, as articulated in *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 256 L. Ed. 2d 469 (1970).

This is not an arcane event in the history of American jurisprudence. Nor did it appear so to a unanimous Court of Appeals and Supreme Court (on Petition for Review). But to the State, the Court of Appeals decision reversing the conviction and remanding, and the refusal of Arizona's High Court to review it, are spine jolting aftershocks of an earthquake of injustice.

In support of this position, the State asserts that there is disagreement among the federal circuits on the issue of the application of the collateral estoppel rule laid down in *Ashe v. Swenson, op. cit.* The State's evidence for this is a number of cases which are proffered to demonstrate this "disagreement".

The first is *Nesbitt v. Hopkins*, 86 F.3d 118 (8th Cir. 1996). One rushes to Westlaw, find's *Nesbitt*, prints it out with alacrity, and reads it with a pounding heart.

But *Nesbitt* has not an iota of relationship to the issue at hand, and in contrast to the State's assertions about it, it not only completely concurs in the collateral estoppel holding of *Ashe* but further tells us pointedly and succinctly why *Ashe* doesn't apply to *Nesbitt*. Nesbitt was tried in one trial on one count of felony murder and one count of first degree murder. The finder of fact acquitted him of felony murder (there being no substantial evidence of the underlying felony of sexual assault), but it convicted him of first degree murder.

Nesbitt claimed on appeal that the acquittal of felony murder somehow collaterally estopped his murder conviction. The Eighth Circuit rejected this out of hand:

> To be sure, the trial court's dismissal of Nesbitt's felony murder charge was an acquittal for double jeopardy purposes. . . . But his conviction of premeditated murder did not place Nesbitt twice in jeopardy because the "criminal rule of estoppel found in Ashe v. Swenson . . . does not apply to verdicts of guilt and innocence rendered in a single trial." Arnold v. Wyrick, 646 F.2d 1225, 1228 (8th Cir. 1981). Se also Ohio v. Johnson, 467 U.S. 493, 500 n. 9 . . . ("where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable"). As the district court correctly observed, "At worst, Nesbitt was tried once on alternative theories of murder. American law has long permitted the assertion of alternative theories of first-degree murder in one murder prosecution without concern that the defendant is subject to double jeopardy if convicted on one theory but acquitted on the other."

Id. at 121.

In further support of its claim of inconsistent application of *Ashe*, the State cites *United States v. Farmer*, 923 F.2d 1557 (11th Cir. 1991). But *Farmer* stands for nothing inconsistent with *Ashe*, and in fact it simply reasserts what is black letter law: *conspiracy* to commit a crime is a separate crime from the *substantive crime*, and acquittal of one does not bar conviction of the other.

The instant case of Bruce Howell is precisely on all fours with this principal of law. Howell was tried in the first trial for,

inter alia, conspiracy by a prisoner to commit dangerous or deadly assault, and the *substantive crime* of dangerous or deadly assault by a prisoner. He was acquitted of the conspiracy, but the jury hung on the substantive crime. The second trial was on the substantive crime, and Howell never sought to have the trial stopped or to prevent it by a claim of double jeopardy or any other claim. Howell was convicted of the substantive crime. However, in the first trial, the jury had acquitted Howell of the separate crime of supplying the murder weapon to the murderer. Notwithstanding this, the trial court permitted the prosecution in the second trial to introduce precisely that fact, of which Howell had been acquitted, in an effort to prove that Howell *did* supply the murder weapon to the murderer.

The decision of the Arizona Court of Appeals was quite simply that in Howell's retrial (third trial), now scheduled to begin on July 16, 2001, the State should not be able to introduce this same fact that has already conclusively been determined against the State.

If *Ashe v. Swenson, op. cit.*, stands for anything, it has to stand for the principal that such relitigation of an already conclusively determined fact violates the double jeopardy's collateral estoppel prohibition. This is all that the instant case is about, despite the State's desire to torture it through pure legerdemain into something more exotic, and to aggrandize the inapplicable cases it cites into a "split of opinion" in the federal courts. There is no split of opinion. The State simply yearns to bring before the United States Supreme Court an issue that has uniformly been decided against the State's position for 30 years.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny the State's petition for a writ of certiorari.

Respectfully submitted,

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No 00-1181.

Supreme Court, U.S.
FILED
MAR 2 2001
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER,

-vs-

BRUCE LEWIS HOWELL,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF ARIZONA COURT OF APPEALS,
DIVISION ONE

REPLY BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

FACTS OF THE CASE 1

REASONS WHY THE WRIT SHOULD ISSUE 2

CONCLUSION 4

TABLE OF AUTHORITIES

CASES PAGE

Arnold v. Wyrick, 646 F.2d 1225 (8th Cir. 1981) 2
Nesbitt v. Hopkins, 86 F.3d 118 (8th Cir. 1996) 2
United States v. Farmer, 923 F.2d 1557 (11th Cir. 1991) 2

FACTS OF THE CASE

Respondent contends that Petitioner's factual recitation of the case contains "unwarranted conclusions." (Brief in Opposition, at 1.) Petitioner's statement of facts is a fair presentation of the facts fully supported by the evidence admitted at trial and includes no "conclusions." Petitioner stands by the factual statement set forth in the petition.

REASONS WHY THE WRIT SHOULD ISSUE

Respondent asserts that *Nesbitt v. Hopkins*, 86 F.3d 118, 121 (8th Cir. 1996), does not relate to the issue whether collateral estoppel applies in a continuing prosecution. (Brief in Opposition, at 3–4.) However, the passage from that case that Respondent quotes illustrates exactly Petitioner's point. The "criminal rule of estoppel found in *Ashe v. Swenson*[1] . . . does not apply to verdicts of guilt and innocence rendered in a single trial." 86 F.3d at 121 (*quoting Arnold v. Wyrick*, 646 F.2d 1225, 1228 (8th Cir. 1981); (Brief in Opposition, at 4).

Nesbitt was tried for first degree murder. *Nesbitt*, 86 F.3d at 119. The trial court *dismissed* a charge of felony murder, and the jury *subsequently* convicted Nesbitt of premeditated murder. *Id.* Nesbitt argued on direct appeal that the evidence was insufficient to prove premeditated murder. *Id.* at 120. The Nebraska Supreme Court rejected that claim and gave a lengthy summary of the circumstantial evidence supporting Nesbitt's conviction; in the course of which, the court cited evidence supporting the underlying felony of which a lack of sufficient evidence prompted the trial court's dismissal of the felony murder charge. *Id.* at 119–20. On appeal from the district court's denial of his habeas corpus petition, Nesbitt argued that in affirming his conviction, the Nebraska Supreme Court violated the Double Jeopardy Clause, including the doctrine of collateral estoppel, by construing the trial evidence as establishing the acquitted charge of felony murder. *Id.* As the *Nesbitt* court framed the issue, Nesbitt sought "to apply a double jeopardy principle that governs successive prosecution cases like *Ashe* . . . to his single, multi-count trial." *Id.* at 121. Thus, the issue in *Nesbitt* is identical to that presented in this case.

Respondent is also incorrect when he asserts that *United States v. Farmer*, 923 F.2d 1557 (11th Cir. 1991), stands for nothing but the principle that conspiracy to commit a crime is a separate crime from the

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1. 397 U.S. 436 (1970).

substantive crime. (Brief in Opposition, at 4.) The *Farmer* court—addressing the propriety of a retrial of one count of a multi-count indictment after a mixed verdict—specifically noted that there was a question whether collateral estoppel, like its parent doctrine of double jeopardy, applies only to successive prosecutions. *Id.* at 1563, footnote 12. Without deciding that threshold question, the *Farmer* court went on to analyze what was actually litigated in the first trial. *Id.* at 1563. Rather than showing certiorari should not be granted, Respondent has illustrated why it is important for this Court to grant the petition for writ of certiorari and decide this question, which, despite Respondent's assertion, has *not* been conclusively determined. (Brief in Opposition, at 5.)

The Arizona Court of Appeals has improperly applied the *Ashe* doctrine of collateral estoppel in a continuing prosecution, as have some other federal and state courts, as noted in Petitioner's petition for writ of certiorari. This Court needs to resolve the question whether collateral estoppel is limited—like its parent doctrine of double jeopardy—to successive prosecutions, and is therefore inapplicable to a continuing prosecution involving a retrial from a multi-count indictment.

CONCLUSION

Based on the foregoing authorities and arguments, as well as those set forth in the petition for writ of certiorari, Petitioner respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

JANET NAPOLITANO
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Criminal Appeals Section

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CRMCRM98-1607
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